

IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN

JEFFREY EPSTEIN and L.S.J., LLC,)	
)	
Plaintiffs,)	CASE NO. ST-10-CV-443
)	
-vs-)	ACTION FOR DAMAGES
)	
FANCELLI PANELING, INC.,)	JURY TRIAL DEMANDED
)	
Defendant.)	

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**PLAINTIFFS' OPPOSITION TO DEFENDANT'S MOTION FOR LEAVE
TO FILE AN AMENDED REPLY BRIEF**

In an extraordinary violation of LRCi 7.1 governing motion practice before this Court, the Defendant Fancelli Paneling, Inc. ("Defendant") filed on March 11, 2011¹ Defendant's Amended Reply to Opposition to Motion to Dismiss with Points and Authorities ("Amended Reply"), and four days *after* filing its Amended Reply, Defendant filed on March 15, 2011 a Motion for Leave to File an Amended Reply with Points and Authorities².

For the reasons set for the below, neither Defendant's multiple motions nor its March 14, 2011 letter to this Court satisfy the excusable neglect standard to enlarge the time to permit Defendant to file its Reply to Plaintiff's Opposition to Defendant's Motion to Dismiss after the expiration of the specified period as required by Super. Ct. R. 10(a)(2), nor do the multiple motions and letter justify the filing of an Amended Reply. Defendant's Amended Reply was filed in violation of LRCi 7.1 and should therefore be rejected by this Court and stricken from the record.

¹ Since there is no electronic filing in the Superior Court, the undersigned can only be guided by the date on the pleading's certificate of service as to when the motion was filed with the Court.

² Defendant's Virgin Islands counsel of record also sent a letter to the Court dated March 14, 2011 offering further reasons why Defendant needed to file an amended reply brief. The March 14, 2011 letter, which was essentially a motion, will also be addressed below.

I. PROCEDURAL HISTORY.

On March 4, 2011 Plaintiffs and Defendant filed a Stipulation to Extend the Time to Reply to Opposition to Motion to Dismiss ("Stipulation").

By Order dated March 7, 2011, this Court disapproved the Stipulation to which the parties had agreed and ordered that "Defendant Fancelli Paneling, Inc. must **FILE** its Motion to File its Reply Out of Time **on or before March 10, 2011...**" The March 7, 2011 Order further stated that Defendant's Motion to File Out of Time must show excusable neglect. Neither of Defendant's pending motions nor its March 14, 2011 letter to the Court satisfies this requirement.

Defendant did not file a Motion to File its Reply Out of Time on or before March 10, 2011, but instead filed Defendant's Reply to Opposition to Motion to Dismiss the Complaint with Points and Authorities on March 10, 2011.

On March 10, 2011, Defendant also filed a pleading entitled "Motion to Extend Time to Respond to File Motion for Leave".

In fact, Defendant never did file a Motion to File its Reply Out of Time showing excusable neglect as ordered by the Court.

On March 11, 2011, in violation of LRCi 7.1, Defendant filed Defendant's Amended Reply to Opposition to Motion to Dismiss with Points and Authorities without prior leave from this Court.

By letter dated March 14, 2011, Defendant's counsel of record submitted to this Court a proposed Order and argued for an extension of time to file an amended reply because the Reply

filed on March 10, 2011 was incomplete due to complications involved in coordinating with Defendant's "long time Counsel in New York (who) has a preferred way of doing things..."

On March 14, 2011 Defendant also filed its "Motion to File Out of Time and for Acceptance Nunc Pro Tunc of Defendant's Reply to Opposition to Motion to Dismiss with Points & Authorities". The title or heading of this Motion refers to the "Reply" but page 1 of the text of this Motion clearly refers to "... (Amended) Reply to Opposition..." Accordingly, this Motion to File Out of Time applied not to the original Reply as ordered by the Court, but only to the Amended Reply filed without leave of the Court.

On March 15, 2011, only after filing the Amended Reply and a Motion to file the Amended Reply Out of Time, Defendant filed Defendant's Motion for leave to File An Amended Reply with Points and Authorities.

Plaintiffs agreed to an extension of time up to and through March 11, 2011 within which the Defendant could file its reply to Plaintiffs' opposition to Defendant's Motion to Dismiss. Therefore, Plaintiffs do not object to Defendant's Reply to Opposition to Motion to Dismiss the Complaint with Points and Authorities dated March 10, 2011 ("Reply"). However, the Plaintiffs do object to the filing of *two* replies to Plaintiffs' Opposition to Defendant's Motion to Dismiss. A comparison of the first Reply and the Amended Reply shows that the primary, if not sole purpose of the Amended Reply is to attempt to refute, with the use of 7 additional exhibits, the Affidavit of Juan Pablo Molyneux that Plaintiffs filed in support of their Opposition to Defendant's Motion to Dismiss. As all of the arguments and materials used in the Amended Reply in the attempt to refute Mr. Molyneux's Affidavit were available to Defendant well before even the commencement of the instant action, Defendant and its counsel could certainly have incorporated them into the original Reply, but they specifically chose not to do so. That they

subsequently choose to do so now in violation of the rules of the Court should not be countenanced.

II. DEFENDANT HAS VIOLATED LRCi 7 AND DEFENDANT HAS FAILED TO DEMONSTRATE EXCUSABLE NEGLIGENCE AS A BASIS FOR LEAVE TO FILE AN AMENDED REPLY.

Instead of filing a Motion to File Out of Time showing excusable neglect for the delay in filing its March 10, 2011 Reply to Plaintiff's Opposition, Defendant filed an Amended Reply on March 11, 2011 and thereafter filed on March 14, 2011 its Motion to File Out of Time and for Acceptance Nunc Pro Tunc of Defendant's Reply to Opposition to Motion to Dismiss with Points and Authorities in which Defendant, at page 1, asks "...for leave to file its (*Amended*) Reply to Opposition out of time for excusable neglect..." (emphasis supplied). The Defendant's March 14, 2011 Motion goes on to recite the history of the parties negotiating extensions of time, the grounds therefor, and includes as grounds for leave to file its Amended Reply that Defendant's Virgin Islands counsel had a brief due before the V.I. Supreme Court, that he was "particularly busy for the weeks last past...", that the firm was short a lawyer, that there were difficulties with Defendant's New York counsel and V.I. counsel "synchronizing systems and procedures to more efficiently meet our schedules with the Court...", and that delays were also attributable to dying computers and traffic. Finally, at paragraph 10 Defendant states:

Although the undersigned's office filed *Defendant's Reply to Opposition* on the 10th, it was not the product intended by Defendant and its attorneys. An *Amended Reply* that had all additions and approvals was filed the following day.³

³ See page 4 of Defendant's Motion to File Out of Time and For Acceptance Nunc Pro Tunc of Defendant's Reply to Opposition to Motion to Dismiss with Points and Authorities.

Plaintiffs submit that the foregoing reasons do not even constitute excusable neglect justifying leave to file Defendant's March 10th Reply out of time, and do not appear to have been filed for that purpose, though this is was precisely what was required by this Court. Instead, they appear to have been offered as a reason for filing Defendant's second or Amended Reply, and do not satisfy the requirement of excusable neglect for the late filing thereof and do not justify the filing of an amended reply brief in violation of LRCi 7.1. In fact, a review of the pleadings in this case shows that Defendant's counsel of record filed on March 10, 2011 a Reply brief which he thought was appropriate but which New York counsel had not approved of, or wished to expand upon. This is not excusable neglect.

LRCi 7.1 specifically governs pleadings and motions filed with the Court and states that "[o]nly a motion, a response in opposition, and a reply may be served on counsel and filed with the Court; further response or reply may be made only by leave of Court obtained before filing (counsel will be sanctioned for violation of this limitation)."

Clearly and knowingly in violation of LRCi 7.1, Counsel for the Defendant filed the Amended Reply before obtaining leave of court and in Defendant's Motion for Leave to File Amended Reply stated at paragraph 5: "Should the Court deem a sanction appropriate after considering the foregoing, counsel requests that it be exclusively his, for the least amount pursuant to LRCi 11.2." Paragraph 5 is an admission that Defendant knew that filing an Amended Reply violated LRCi 7.1.

The fact that an attorney is busy on other matters does not fall within the definition of "excusable neglect. *Kansas Packing Co. v. Lavilla*, 39 V.I. 71, 1998 VI LEXIS 16 (1988). Proving excusable neglect requires a "demonstration of good faith on the part of the party seeking an enlargement and some reasonable basis for non compliance within the time specified

in the rules.” *Petrucelli v. Bohringer and Ratzinger*, 46 F. 3d 1298 (3d Cir. 1995), rehearing and rehearing in banc denied (February 28, 1995). A comparison of the original Reply filed March 10th and the Amended Reply shows that the primary if not sole purpose of the Amended Reply is to attempt to refute the Affidavit of Juan Pablo Molyneux that Plaintiffs filed in support of their Opposition to Defendant’s Motion to Dismiss. Everything Defendant needed to address this in its original reply brief was in Defendant’s possession before the instant lawsuit was filed.

The excuses proffered in Defendant’s March 14, 2011 letter, which essentially reads like a motion and is accompanied by a proposed form of order also fail to show excusable neglect. The March 14, 2011 letter seeks leave of the Court for an extension of time to provide reasons for its Motion for Leave to File its Reply out of time. The reasons given for more time to file Motion for Leave to File a Reply were: “My Client is not comfortable communicating in English. His long-time Counsel in New York has a preferred way of doing things as a consequence of this and habit and I am just adjusting time and protocols to account for coordinating matters that way on this end” does not constitute excusable neglect. Even if Defendant’s New York counsel “has a preferred way of doing things”, the rules of this Court certainly do not permit lawyers who are not admitted in this jurisdiction to dictate Court procedure. The rules of this Court should apply to all parties equally (whether or not they are also represented by counsel from another jurisdiction) and the fact that New York counsel needs to approve the filings by Virgin Islands counsel does not constitute excusable neglect.

**III. DEFENDANT IS NOT ENTITLED TO AMEND A REPLY TO AN
OPPOSITION TO A MOTION TO DISMISS PURSUANT TO FED R. CIV.
P. 15(a)(1) BECAUSE SUCH A REPLY IS NOT A PLEADING.**

On March 16, 2011, Plaintiffs also received by U.S. Mail, Defendant's Motion for Leave to File an Amended Reply With Points and Authorities dated March 15, 2011, arguing, essentially, that Defendant should be permitted to amend its Reply to Opposition to Motion to Dismiss the Complaint with Points and Authorities ("Defendant's Reply") pursuant to Fed. R. Civ. P. 15(a)(1). This argument is inherently contradictory because if Fed. R. Civ. P. 15(a)(1) permits a party to amend its pleading once as a matter of course within 21 days after serving it, then there would be no need to file a motion for leave to amend said pleading.

Moreover, Defendant's motion for leave for file an Amended Reply, which is improperly before this Court, on the basis of Fed. R. Civ. P. 15(a)(1) must be denied because Defendant's Amended Reply is not a pleading. Fed. R. Civ. P. 7(a) defines pleadings as a complaint, answer to a complaint, answer to a counterclaim designated as a counterclaim; answer to a cross claim, a third-party complaint and if the Court orders one, a reply to an answer. Defendant's Amended Reply does not meet any of the permitted pleadings itemized in Fed. R. Civ. P. 7(a) and therefore, it cannot be amended as a matter of course pursuant to Fed. R. Civ. P. 15(a)(1) or by leave of Court.

IV. CONCLUSION

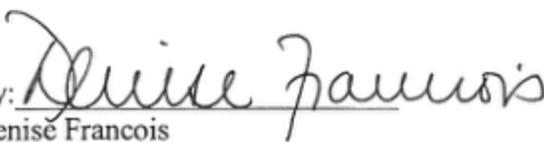
In spite of Defendant's multiple filings and letter to the Court, its Amended Reply is improperly before this Court. As of this date, Defendant has not complied with this Court's Order of March 7, 2011 and Defendant still has not filed a Motion to File its Reply Out of Time

showing excusable neglect. Instead, it has filed a different or what is called an "Amended Reply" in violation of LRCi. 7.1.

Should this Court agree to retroactively grant Defendant leave to file its Amended Reply, then Plaintiffs request an opportunity to respond to same since Defendant's Amended Reply and exhibits attached thereto present a one sided view of the communications between the parties and their actions. In the alternative, should this Court agree to retroactively grant Defendant leave to file its Amended Reply, then Defendant's pending motion to dismiss which refers to matters outside of the pleadings must be treated as a motion for summary judgment and must be denied given the genuine dispute as to material facts created by Defendant's selective production of information designed to refute the sworn affidavit of Mr. Juan Pablo Molyneux. Plaintiffs were entitled to produce affidavits and exhibits to address the issue of personal jurisdiction. However, the Defendant has introduced exhibits that go beyond the factual allegations of the First Amended Complaint thereby converting their motion to dismiss into a motion to summary judgment and the conflicting material factual allegations, which are even highlighted by Defendant require the denial of Defendant's Motion to Dismiss which has evolved into a Motion for Summary Judgment.

Respectfully submitted,
HODGE AND FRANCOIS

Dated: 3/29/2011

By: 
Denise Francois

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Email: 

*Attorneys for Jeffrey Epstein and
L.S.J., LLC*

*Plaintiffs' Opposition to Defendant's Motion
For Leave to File Amended Reply
Epstein et al. vs. Fancelli Paneling, Inc.
Case No. ST-10-CV-443*

CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT that I caused a true and correct copy of the foregoing **Plaintiffs' Opposition to Defendant's Motion for Leave to File An Amended Reply** Brief to be served upon Treston E. Moore, Esquire, MOORE DODSON & RUSSELL, P. O. Box 310, St. Thomas, VI 00804 by first class U. S. Mail, postage prepaid on this 29th day of March, 2011.

Anoushka Anna McCoy